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OPINION ON A QUESTION OF GENERAL AVERAGE.*

CASE.

THE China Mutual Insurance Company, by policy dated October 19, 1858, caused Mr. Otis Norcross to be insured $4,750, on one eighth of ship Time for one year.

The policy was in the usual form issued by insurance companies in Boston, — the only clauses relating specifically to wages and provisions, being one by which it is provided that in case of total loss with salvage, the amount allowed out of it to the officers and crew for wages earned previously to the loss, shall be considered as so much of the salvage applied to the owner's use, and be deducted in adjusting the loss; and another in these words: "The Company is not liable for wages or provisions, except in general average."

On Dec. 25, 1858, the vessel sailed from Batavia in ballast, without any cargo on board, for Singapore, seeking freight; and on Jan. 13, 1859, struck upon a wreck or reef, and received damage which compelled the master to return to Batavia, where she arrived on the 23d of the same month. She was unavoidably detained for the purpose of making repairs, until March 26, 1859, when she was ready to sail again.

* This opinion, upon a novel and interesting point of insurance law, has been kindly furnished us at our request, by its distinguished author. Its publication will, we think, settle the law upon the point.

The insured claims for wages and provisions from Jan. 13 to that date, as due in the nature of a general average loss. The underwriters decline payment on the ground that Singapore being a British port at which the adjustment of a general average loss should be made, and by the law and usage of England, wages and provisions not being proper subjects of general average contribution, they are not liable to any claim therefor.

No adjustment was made at Batavia or Singapore where she arrived, — there being no contributory interests in cargo or freight; — but one was made upon the vessel's arrival in New York, in which wages and provisions for the period above stated are included, and upon which the present claim is founded.

OPINION.

This question has been argued in writing by two very eminent jurists, but apparently without reciprocal knowledge by each of the views taken by the other; and so without the benefit that might have resulted from oral discussion, or an interchange of arguments, to aid in determining upon the merits of their respective positions.

Both seem to have considered it clear, and to be taken as conceded, that wages and provisions would not have been chargeable in general average upon an adjustment made abroad. They certainly would not have been in one made at Singapore, a British port, governed by the English law and usage, which exclude them: and I infer that they would not have been in one at Batavia, — the loss occasioning the return not being in itself one of a general average contribution; — and the general maritime law of Europe, as I understand it, excluding wages and provisions in all other cases.

It is clear, I think, that the general average in this case should have been adjusted at Batavia, the port of departure, if there had been cargo and freight to contribute, and not at Singapore. Benecke, Lond. ed., 1824, pp. 288, 326. Phil., Stevens & Benecke, 229. 14 Pick. 34, *Tudor* v. *Macomber*. In that case, however, the original voyage was entirely broken up, but the court recognize the general doctrine. And if therefore it should be found that by the laws or usage prevailing there, wages and provisions are contributed for, it would in my judgment be decisive in favor of the claim of the insured.

But assuming it to be otherwise, the main question recurs, and in the present state of judicial doctrines and elementary opinions it is not one of easy solution, as plainly appears by the two learned opinions exhibited.

The counsel of the ship-owner maintains "that it is immaterial whether wages and provisions are chargeable at the foreign port of adjustment in a case like this, — because if they were embraced in the policy, according to the law of the place where it was made, the underwriters are liable for them to the extent of a full indemnity of the insured, even if it be in payment of items not allowed in an average duly adjusted abroad; — the insured being entitled to his full indemnity stipulated by his policy; and nothing short of that, obtained from any quarter, satisfies his claim."

And in support of this doctrine he cites the case of *Thornton* v. *The United States Insurance Co.* 3 Fairfield's Rep. (Maine,) 150, — which case is direct to that point.

Considering that point established, he next proceeds to consider what effect is to be given to the clause providing that "the company is not liable for wages and provisions except in general average;" and having stated that if this exception imports that the insurers are not liable except for sums to be contributed by the ship when there is a contribution also by another subject, then the insurers are not liable; but that if it means that they are not to be liable unless the charges are in their nature of a general average character, such as would be contributed for if there were three contributory interests, then they would be liable,— he proceeds to show that wages and provisions in a case like this are in nature of a general average, by citing the case of *Potter* v. *The Ocean Insurance Co.* 3 Sumner Rep. 38, by which it was decided that, where a vessel meets with disaster and bears up for a port of necessity, wages and provisions are chargeable as in general average, although she was in ballast; — the "distinction between general and particular average being determined by the consideration whether the act is intended for all concerned in the voyage, and not in particular by the consideration who are to contribute to the indemnity." And as the same exception was contained in the policy in that case, the counsel considers it decisive upon its character and meaning in favor of the claim in this. He does not, however, notice the distinction between the

two cases, namely, that in *Potter* v. *The Ocean Insurance Co.*, wages and provisions were chargeable in general average by the laws and usage of the place where an adjustment should have been made, had there been other contributory interests, — it being within the United States, — whereas in the case now under consideration they would not have been so chargeable; — so that the authority cited goes no further than to determine that voluntary sacrifices are to be accounted as subjects of general average contribution, although the vessel be in ballast only, and not in pursuit of freight contracted for; — and that the exception in the policy does not apply to such a case, in all which I understand the insurers in this case to agree.

It is observable that in these views the court, in the case *Thornton* v. *United States Insurance Co.*, and the learned counsel for the owner in this, assume that wages and provisions are to be accounted a general average loss, in a case where, by the laws of the country where the adjustment must be made they are not so accounted, if they would be accounted such in one regulated by the laws of the country where the policy was made. They rest upon the hypothesis that the term "general average," as used in commercial law, or in the policy, must be taken to mean or include "general average," as adjusted by the laws of the country where the policy was made, so as to entitle the assured to indemnity according to them; while at the same time they insist upon the binding force of the foreign adjustments upon the insurers, when the insured would not otherwise receive the alleged full indemnity; thus making foreign adjustments binding upon the insurers in all cases where working against them, but not in any where working in their favor. And they go to the whole extent of maintaining that not only is the portion of wages and provisions which should have been assessed upon the ship, as one of the contributory interests, if they had been included in the foreign adjustments, recoverable of the insurers, but that the whole amount is to be allowed in order to secure to the insured a full indemnity. Such is the plain language of the court in Fairfield's Reports, and of the counsel in this case; and the adjustment on which this claim is based is made up on that principle, — the ship being charged with the whole amount of wages and provisions.

It seems that Mr. Phillips and Mr. Parsons do not so un-

derstand that case, but consider it as establishing the right of the insured to recover only the ship's contributory portion. 2 Phil. Ins. §1415. 1 Parsons's Maritime Law, 433. This is, however, I think, a manifest mistake of the language of the court, and the principle on which the case is expressly decided, namely, that the insured is entitled to full indemnity, and upon that principle he is as well entitled to recover the whole amount where the claim is entirely excluded by the laws of the place as a subject of contribution, as he is where it would be admitted, but the vessel being in ballast there are no other interests to contribute.

I see no logical escape from the result that the insurers are liable for the whole amount of wages and provisions, if they are for any portion, where they are thus excluded, if the doctrine of the case of *Thornton* v. *United States Insurance Co.* be received as sound.

Mr. Parsons, it seems, in a note to the above case, questions its equity, and does not cite it with much seeming approbation. It might, perhaps, have received a little more attention from both these learned authors, if the full extent of its doctrines had been understood by them as it is by me.

The counsel of the insurance company, on the other hand, recognizing the seeming infirmity of the decision in Fairfield's Reports, as begging the question by assuming that wages and provisions constitute a general average loss when excluded from a foreign adjustment lawfully made, and so becomes a claim under the policy, states the question to be whether the "general average" referred to in the policy means general average according to the laws of Massachusetts, or general average according to those of the place of destination, — and expresses the opinion that the latter is meant; both parties being understood to refer to, and agree to be bound by, the law of the place where the general average is required to be assessed, for the purpose of determining whether a particular item shall be deemed fit to be included a general average; and he cites the case *Simonds* v. *White*, 2 B. & C. 813, in which the court says: "By assenting to general average, the co-adventurers must be understood to assent also to its adjustment, and to its adjustment at the usual and proper place, and to all this it seems to us only an obvious consequence to add, that they must be understood to assent to its adjustment according

to the usage and law of the place at which the adjustment is to be made." And the case *Peters* v. *Warren Insurance Co.*, Story's Rep., 470, is also cited as maintaining this doctrine.

And he proceeds further to argue that inasmuch as the insured, who has sustained a loss for which he is entitled to contribution, is not obliged to look first to the contributors, but has an immediate remedy against his underwriters, as decided in *Forbes* v. *Manufacturers Insurance Co.* 1 Gray's Rep., it would follow, if this doctrine is sound, that the owner may recover of them the whole amount, leaving them to seek contribution from the co-adventurers; and as in the case supposed they could have no such claim, they would have to bear the whole loss, — not in general average, but as a partial loss.

This would be a logical deduction, if the case of *Thornton* v. *United States Insurance Co.* is understood to decide that the insurers are answerable for the whole loss, as I interpret it, and not for what would have been the ship's contributory share, as in the inference drawn from it by Mr. Phillips and Mr. Parsons.

Here, then, we have what seems a direct conflict of judicial decision and of opinion between very eminent mercantile jurists, and a recurrence, therefore, to an elementary view of the case seems called for.

The term "general average," as used in this policy and as understood in commercial language, may be applied equally to all averages, both under foreign and domestic adjustments, and there is nothing tending to show that it was here intended to be limited to one adjusted according to the laws of Massachusetts, or to one to be adjusted by the laws of any foreign place of adjustment. Nor was the insertion of the phrase essential to cover such a loss, — a general average loss being one to which a policy attaches by the maritime law, whether it be or be not specifically enumerated.

The first inquiry, then, naturally suggesting itself, is, What is the meaning of the term "general average loss?" And the answer is simple and of universal acceptation, "A loss or sacrifice voluntarily incurred for the common benefit of all concerned in the voyage, and to indemnity for which all are bound to contribute in proportion to the interests to protect which the sacrifice was made." And each element is essential; no loss can fall within the universally received definition, which was not in its nature voluntary, and does

not, for that reason, impose upon the co-adventurers the obligation to contribute where more than one interest is concerned; or is not in its nature such as would impose that obligation in such case. And it seems to follow, as a necessary conclusion, that any loss, for which such contribution cannot under any circumstances be demanded, cannot be accounted a general average loss. The right and duty of contribution is of the essence of a general average loss.

The meaning of the term being thus clearly ascertained, the next question presenting itself is, How is it to be determined whether a loss in question is within the definition, or one for which contribution is legally demandable? And the answer is equally explicit and well settled by judicial decision,— namely, that a general average loss must be adjusted by the laws of the port of destination, if the vessel put into an intermediate port, and the voyage be subsequently pursued; or at the port of departure if the vessel return there to refit. And that such laws are conclusive upon the relative rights and liabilities of the owners of ship, freight, and cargo; and not only in regard to the valuations, contributory interests, proportions, &c., but also in reference to the proper subjects to be contributed for, or excluded from the claim for contribution. This must certainly now be considered the general law as settled in this country and in England.

As between the owners, then, there would seem to be no doubt, that no loss can be deemed a general average loss which, by the laws of the place of adjustment, must be excluded from the right of contribution; but that it thereby becomes, so far as they are concerned, a partial loss only, falling exclusively upon the individual owner of the subject lost or damaged.

On what principle, then, can he claim of his underwriters payment on account of it as being a general average loss? He clearly has not actually sustained any such, for by the laws, conclusive upon him and all other owners interested in the voyage, he is precluded from claiming against them; and the nature of the loss is thus by the only legal authority, definitively and practically determined not to be an average loss. In the place, then, and at the time, and for the only purposes of an adjustment, and by the only legal authority, the loss is not an average loss, and can confer on the owner of the subject of it, no right, nor impose upon him any liability as such.

How, then, can his insurers be held liable to indemnify him as having sustained one? The only answer of which I am aware is found in the case of *Thornton* v. *United States Insurance Co.*, above cited, in which the court says: "The general rule is that the law of the place of the contract is to govern. By our laws the term general average includes wages and provisions, and unless there be something in the contract from which it can be inferred that the parties contracted with reference to the law or usage of some other place, this construction must govern. That the construction of a contract may be varied by reference to the law of the place where it is to be performed, but in this case the place of execution and performance is the same, and although the amount of indebtedness might depend upon, and be affected by foreign laws, as they would measure the amount of contribution to be received from owners of the goods, yet as the contract is one of indemnity, it must render the insurers answerable for all losses insured against, except so far as the insured has been indemnified by the foreign adjustment. We cannot admit that the contract is to be construed by foreign law or usage, or that we are to resort to either to ascertain what losses are covered by it, or what is to be included in each description of loss. The insured has sustained a loss covered by the policy. For the amount of that loss the insurers are answerable, after deducting what the assured has received by way of average contribution from owners of the cargo, and we have not been able to see any sound reason for limiting his claim to the sum estimated as his loss in the foreign adjustment, when it conclusively appears that losses were excluded from that adjustment which by our laws were covered by the policy, and to be borne by the insurer."

This whole reasoning obviously depends upon assuming that the parties to the contract, when using the term "general average," or agreeing for an indemnity against one, meant a general average adjusted according to the laws of the United States. But this is clearly not so, and the court itself admits that this is not so, for it expressly says, that where a loss by contribution is sustained by the owner of goods under a general average adjusted abroad, which he would not be liable for under one made at home, the insurers are bound to indemnify him, — and it is universally conceded that general averages being binding as above

stated, on the owners, their insurers are held to indemnify them accordingly, although the losses may be greater than they would have suffered, or be in contributions for items that would not have been admitted under a domestic adjustment; and that the insurers can never be called upon to pay to the owner a greater loss than he has been put to by the foreign adjustment, although it be much less than would be due from him on one made at home. This assumption, therefore, is plainly erroneous, for if the parties to the policy intended to contract solely with regard to "general average losses," as regulated by the laws of the place where it was underwritten, it would follow inevitably that the insurers could never be held for more than such an adjustment would impose upon them, and that the assured would always be entitled to recover all that such an one would give to him; both of which conclusions this same court expressly repudiates, and the whole mercantile world joins in repudiating.

Nothing, therefore, can be clearer than that the parties, in using the term general average, or in contracting in reference to that species of loss, do in fact, and of necessity, refer to foreign as well as to domestic adjustments, to both or either, and recognize their rights and liabilities under the contract as being more or less dependent upon, and to be determined by laws regulating both or either, as the case may require. And if they do thus contract in necessary reference to both, and the rights and liabilities accruing under them respectively, upon what principle can it be maintained that each is not as binding in deciding what is, and what is not, the subject of average loss, as in determining upon the valuations, proportions of contribution, and all the other elements constituting one?

It is manifest that there can be but one average loss arising from one disaster, and that it must by law be adjusted, and all the rights and liabilities of the parties be definitively settled at the place which the laws prescribe for its adjustment.

Any loss, therefore, that by those laws is not the lawful subject of contribution, cannot be accounted a general average loss there; nor can it be properly accounted one anywhere else, because no adjustment of the damages can be made in any other place; and to hold the underwriters liable in such a case as this, is to hold them in fact for two

general average losses, one abroad so far as the ship-owner has sustained any loss under that, and one here where none has taken place. If, then, the insurers in this case are liable for wages and provisions, it is not because they constitute an average loss, for none such had occurred according to the only laws regulating the subject at the only lawful place of adjustment, and none such had occurred at the home port, for no power exists to make an adjustment, or assess or enforce contribution there; and they would be in truth and effect held for a partial loss, which, by the laws of Massachusetts and the exception in the policy, they are exempted from. When the insurers contract to indemnify the assured against an average loss, they certainly cannot be understood as stipulating for more than a reimbursement to him, of whatsoever shall be his contributory share of it. How, then, can they be liable to pay him the full amount of any loss for which no one is, or ever could have been, or ever can be, made liable to contribute anything? Is it not a contradiction in terms, to account such a one an average loss? And what answer is given, by saying that it is one under an adjustment made according to the laws of Massachusetts? That amounts to nothing more than saying what it would have been, under other circumstances, — it does not make it one under these.

No one will dispute the position taken by the court, that the contract must be construed according to the laws of Massachusetts, but it by no means follows that when a term is used in it, descriptive of a kind of loss, embracing two species, and necessarily embracing and referring to its occurrence abroad as well as at home, — and the operation of foreign laws as well as of domestic laws in determining its nature and extent, according to the place where it may happen, — that reference is to be had only to the laws of Massachusetts in determining such nature or extent, especially as its nature is inevitably involved in its extent. It seems not irrational to say that the parties, having both species of loss in view, must be supposed to contract in reference to each as it shall actually occur, and that the only application of the laws of Massachusetts in the case is, to hold them to their bargain to abide by the loss as it shall actually occur, according to events and the laws of the place where, by law, its nature and extent must be ascertained, and the rights and liabilities of the assured in it must be determined.

Nor can this be esteemed any departure from the principles of providing the full indemnity to the assured stipulated for in the policy, as the court in Fairfield's Reports seems to think, for if the indemnity contemplated by the contract refers to actual average losses, and looks to the operation of the laws of adjustment, universally admitted to be binding upon the assured and his co-adventurers as determining their nature and extent, which surely is a view entirely consistent with the language of the policy, and certainly seems the most natural, the full indemnity stipulated for is given when the insured is indemnified for what he has paid under the adjustment, or for what he has failed to receive under one, where, if other interests were involved, one should have been made.

But it may be objected, that although the above reasoning might be satisfactory in a case where the adjustment was actually made abroad, because the contract contemplated that contingency, and because such adjustment partakes of the nature of a suit in admiralty against the property, and the various subjects are under liens for their respective portions of the contribution which can be enforced against them; yet that no such reason exists when no adjustment was actually made, nor necessary to be made abroad, but remains open until the vessel returns to her home port, and no necessity exists of conforming to any law other than that of the place where the policy was made, and no act has taken place requiring any other indemnity than one under its provisions.

But this objection seems to me founded upon the same begging of the question above suggested, — namely, that the parties to the policy have reference to a general average under the laws of Massachusetts only, and not to that under any foreign laws where an absolute necessity of abiding by them does not exist at the time of its adjustment; whereas upon the principles and reasonings above stated, it is maintained that they refer equally to foreign as well as domestic averages, and to the laws by which they are to be adjusted wherever the adjustment properly belongs.

It is to be remembered that the question of what is and what is not an average loss, is not one originally between owners and insurers, but between the ship-owner and shippers only; — the insurers being liable merely to indemnify them for their respective portions of the loss as lawfully adjusted between themselves.

Whatever, therefore, is not an average loss as between the owners, or in the nature of one, cannot be truly called an average loss anywhere, nor be one which the insurers can be held to pay for; and to call upon them to pay for one which never, under any circumstances, could be made the subject of contribution, or be caused by the insured's being compellable to make contribution, is certainly not for a general average loss, by whatever other name it may be called.

As no general average contribution could actually have existed in this case, there being no cargo or freight contracted for, the only ground on which the ship-owner can claim for wages and provisions in general average, is that the loss of them here was in the nature of a general average; and this is stated as his only alleged ground of claim. If, then, he is entitled on that score, we have next to see what is the nature of the general average loss for which he claims indemnity. I suppose it clear that no loss can be in the nature of a general average, where ship, cargo, and freight would not be compellable to contribute if there were cargo on board. In order to ascertain, then, what is the nature of any general average in question, we must inquire what would have been the subjects of contribution and rates of apportionment, if there had been cargo on board; and to answer that question, we must find out the laws of adjustment at the place where it must by law have been made, if cargo had been on board; and then we have the loss, in the nature of general average, which has actually occurred.

But because there was no cargo on board, rendering a foreign adjustment necessary, then to resort to another country to make one, which never could have been made or enforced, if a real actual contribution had been to be made, is to adopt a general average loss of another nature than that which actually occurred.

The insurers underwrite against general average losses, wherever they may happen. When they happen abroad, the laws of the place of adjustment determine their nature and extent; and when they happen at home, these are to be regulated by the domestic laws. In this case the general average loss, if any occurred, happened abroad, and no actual claim for contribution, or actual liability for one, could have been adjusted or enforced except under the laws of Batavia or Singapore, and therefore no one of any other nature has taken place.

I know that it is sometimes said in the books, that the reason why a foreign adjustment is binding, is because it is the master's duty to settle it abroad, as otherwise he would lose the power to enforce contribution, and so it becomes binding upon the insurers; and hence it might be argued, that where that necessity does not exist, the reason of the rule ceases, and the insurers should be held to a domestic adjustment.

But it seems to me that this is a very superficial view of the case. A foreign adjustment of general average would be binding upon all the parties among themselves, whether the master should or should not enforce his liens on the goods at the port of destination, and the ship-owner and shippers would have the legal right of recovery of their respective claims, and be under their respective liabilities for their contributory portions as debts, everywhere. Such claims and liabilities are debts and credits, like any other mercantile claims and liabilities, to be enforced anywhere.

The ship-owner is not the only party concerned. He may be the least interested, as in case of great jettison, and no injury to the vessel. Can the master, by refusing to adjust the general average at the port of destination, defeat the shipper's claims upon the vessel and freight? Or can he, by deferring the adjustment until his arrival at home, make the liability of the ship to contribute less than it would have been at the port of destination, and thus impose a greater loss upon the shippers? Or, to put the case more pointedly, can he, because wages and provisions are not allowed at the port of adjustment, defer one till he gets home, and there charge them upon the shippers, and so increase their contributory shares?

All the parties interested in the voyage, have the legal right to have their respective claims and liabilities adjusted at the port of destination; and can never claim more, nor be made liable for more anywhere else, than they could have claimed, or would have been liable for there: and the master, by omitting or refusing to make it there, could not increase or diminish either: and it is difficult to perceive on what principle insurers against a general average loss, can be held liable to the insured for any other or greater one than he has actually sustained. To make them responsible for one, to or for which the other parties were not legally bound to contribute, and never could be made to do so, is

certainly not to hold the insurers liable for the insured's share of a general average loss, but is to hold them to indemnify him for a partial loss, falling entirely upon himself, and which loss in this case he is precluded from recovering by the law and express language of the policy.

Indeed, I do not perceive how a clearer case can be stated, than that presented under the exceptional clause. The parties to the policy stipulate expressly that the "insurers shall not be liable for wages and provisions, except in general average." Nothing can be clearer than that they thus expressly agree that the insurers shall be held only for the insured's portion of such a loss, as lawfully assessed upon all interested in the voyage, as distinguished from a liability to pay for the whole as a partial loss. Under no circumstances, therefore, where cargo is on board, can the liability of the insurer exceed the insured's contributory portion; for the moment we go beyond that, we make them liable for something more than a general average loss; — and where the loss as in this case falls wholly upon the insured, because there was no cargo on board, and he claims indemnity for one on the ground that it was in nature of a general average, and confessing that he could not recover for it as a partial loss, — it seems equally clear that he must show that the average loss is of a nature that if an actual one had occurred, would have embraced his claim; otherwise he is claiming for a loss as of a nature which never by possibility could have actually happened; and thus deriving from a *quasi* general average loss, or a loss merely in the nature of one, the right to a greater amount than he could have recovered if one had actually occurred.

Upon the fullest consideration, therefore, which I have been able to give, I should feel the clearest conviction, that if wages and provisions are not subjects of average contribution according to the law and usage prevailing at Batavia, the insurers under this policy are not liable for them; and this conviction, notwithstanding the authority of the case of *Thornton* v. *United States Insurance Co.*, which of course raises great doubts of its propriety, remains such, that I think that case would be overruled by the Supreme Court of this State, — and compels me, therefore, so to decide.

(Signed,) CHARLES G. LORING.

Boston, *March*, 1860.

ENGLISH ADMIRALTY JURISDICTION.

1. Rules, Orders, and Regulations for the High Court of Admiralty in England, made in pursuance of the Provisions of the Acts of 3 and 4 Vict. c. 65 and 66, and 17 and 18 Vict. c. 78. With forms and tables of fees. London, 1859.
2. Two Lectures on the Jurisdiction and Practice of the High Court of Admiralty of England, delivered before the Incorporated Law Society. By John Morris, a Member of the Society. London, 1860.

THE exact period in which the Court of Admiralty was established in England, will probably never be known. No mention is made of it by Britton, who wrote in the 13th or 14th centuries, and hence some have argued that the court did not at this time exist. But Britton's purpose was only "to set forth the courts whereof there was common use," and his omission of its mention proves only that the Court of Admiralty was at this time of but little service and use to the people of England. Blackstone, on the authority of Spelman and Lambard, assigns the reign of Edward III. as that in which this court was "first of all erected." Lord Coke, however, says: "And yet *altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the lord admirall, whose jurisdiction is verie antient, and long before the reigne of Edward the Third, as some have supposed, as may appear by the lawes of Oleron, that there had been an admirall time out of minde, and by many other antient records is most manifeste." No important or reliable evidence has, however, been adduced to show that the court had any existence prior to the time of Edward the First, and it is to that monarch that the honor is generally given, by those who have most thoroughly investigated the subject, of originating a court which has proved of such incalculable benefit to the maritime world.

At a time, however, when the common law courts depended upon the amount of business done for their emoluments, it is not surprising that as the Admiralty Court increased in importance, the jealousy of the courts of common law began to seek some way by which to limit the jurisdiction of the Court of Admiralty. This was done, says Prynne, "for more jurisdiction, for gain, not for the public good, but that one jurisdiction might swallow up the other."

In the reign of Richard II. frequent petitions of the commons complained "that the admiral and his officers held pleas of contract arising in the bodies of counties, of trespasses, debts, quarrels, wears, kiddles, breaking open of houses, carrying away goods, illegal imprisonment, excessive fees, and extortion."

Two statutes, called the "restraining statutes," were thereupon passed. The first, 13 Rich. 2, c. 5, enacted that "the admirals and their deputies shall not meddle, henceforth, of anything done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward III., grandfather of our Lord the King that now is." The next was the statute, 15 Rich. 2, c. 3. It enacted "that of all manner of contracts, pleas and quereles, and of all other things done or arising within the bodies of counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no matter of cognizance, power nor jurisdiction."

Mr. Justice Story in his elaborate decision in *De Lovio* v. *Boit*,* challenges the production of any authority prior to the 13 Rich. 2, which, properly considered, impeaches the jurisdiction of the Admiralty as asserted by him, namely: "that before and in the reign of Edward III., the Admiralty exercised jurisdiction, — 1. Over matters of prize and its incidents; 2. Over torts and offences in ports within the ebb and flow of the tide, in the British seas and on the high seas; 3. Over contracts and other matters regulated and provided by the laws of Oleron, and other special ordinances; and 4. Over maritime causes in general.

Lord Coke, however, who is said by Mr. Justice Buller to have entertained not only a jealousy of, but an enmity against, the Admiralty jurisdiction, bent the whole force of his great intellect to the subversion and destruction of the Court of Admiralty, and the common law judges, supported by such an authority, and influenced by the increased gains, which such a course caused to accrue to their courts, granted prohibition after prohibition, till at last the Admiralty Court was left with scarcely a fragment of its ancient jurisdiction.

The common law courts contended, as is stated by Mr. Morris, "1st. That the jurisdiction of the Admiralty is confined to contracts and things made and done upon the

* 2 Gallis, 398.

sea, and to be executed upon the sea: whereas all important maritime contracts are necessarily, from the nature of the case, entered into on land.

"2. That the Admiralty Court has no jurisdiction over maritime contracts made within the bodies of counties or beyond the sea, although of a maritime nature.

"3. Nor of contracts made upon the sea, if to be executed upon land, or not of a maritime nature, or under seal, or containing any unusual stipulations.

"4. Nor over torts, offences, or injuries done in ports, or within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide."

The Admiralty Court, on the other hand, claimed jurisdiction over all maritime contracts, contending that the subject matter, and not locality, was the true test; and as to torts, it claimed cognizance over all those committed on the high seas and so far as the tide ebbs and flows.

It would seem that the Court of Admiralty early exercised jurisdiction over contracts made beyond the seas, but the common law courts deprived it of this, and took it to themselves, by one of those fictions of law which impress the student with a profound admiration of the ingenuity with which the judges of those days evaded all obstacles to the acquisition of power and wealth. Thus, if a contract was made in France, by the ancient common law, no action could be brought on it in the County of Middlesex in England, it being necessary that the action should be brought in the county where it was averred to have taken place, or in a court independent of such restrictions as the Court of Admiralty. But in the language of Lord Coke, a contract "may be alleged to be made *in quodam loco vocat* Bourdeaux in France in Islington in the County of Middlesex, and there it shall be tried, for whether there be such a place in Islington or no, is not traversable in that case."

In the 8th year of James I. (1610) an agreement was read before the king, the judges of the King's Bench and Admiralty being present, which was alleged to have been made between the judges in 1575. The chief points agreed upon were that the party defendant to the writ of prohibition should have permission to appear by counsel and plead for the stay thereof, and that prohibitions should not issue upon bare suggestions and surmises. "That the Judge of the Admiralty, according to such ancient order as hath

been taken, 2 Ed. I., by the King and his Council, and according to the letters patent of the Lord Admiral for the time being, and allowed of by other kings of this land ever since, and by custome, time out of memory of man, may have and enjoy the cognition of all contracts, and other things arising as well beyond as upon the sea, without any let or prohibition." It was also agreed that the Admiralty should exercise jurisdiction over charter-parties, though made on land, if they were to be performed upon or beyond the seas.

Although this agreement appears to have been acted upon, yet Lord Coke disregarded it on the ground that it was not subscribed by any of the judges. And in 1632, in the 9th year of Charles I., new articles of agreement were accordingly drawn up, which were signed by all the judges.

By these articles it was agreed that the Admiralty should have jurisdiction over contracts made, or other things personally done beyond the seas; over suits for freight, mariners' wages, or for breach of charter-parties for voyages to be made beyond the sea, although the charter-parties happened to be made and the money payable within the realm. But if the suits were for the penalty, or if questions were made whether the charter-party were made or not, or whether the plaintiff did release or otherwise discharge the same within the realm, these questions must be tried in the courts of common law.

Jurisdiction was also given *in rem*, but not *in personam* for building, amending, saving, or necessary victualling of a ship, and power was given to the admiral "to enquire of, and redresse all annoyances and obstructions in all navigable rivers, beneath the first bridges, that are any impediments to navigation, or passage to and from the sea, and also to try personal contracts and injuries done there which concern navigation upon the sea."

These resolutions, though signed and certified with every formality, appear to have been of as little use as those of 1575, and no respect was paid to them on the part of the common law judges.

In this way the Court of Admiralty struggled on, at one time receiving a few rays of the sunshine of popular favor, and then persecuted almost to the death. So that it is little to be wondered at that even so late as the time of Lord Stowell, as we are informed by Mr. Coote, in the

preface to his "New Practice of the Court of Admiralty," it was a weighty objection to the publication of the reports of the proceedings of the court, when publication was first proposed by members of the bar, that the reports would expose the nakedness of the land.

The deliberate and impartial judgment of this learned judge, Lord Stowell, sitting on the prize side of the court, at a time when all Europe was convulsed with war, did much, no doubt, to convince the people of England that the prejudices which existed against the jurisdiction of the court were unfounded, and that, as a matter of expediency, if not of right, this jurisdiction should be increased and made available for the every-day wants of the mercantile world. And we have no doubt that the earnest efforts of Mr. Justice Story in this country to establish the Admiralty jurisdiction of the courts here on its ancient foundation, tended greatly to bring about this result. And at the present day, in England, the court exercises a jurisdiction, in some respects even greater than that contended for so earnestly and at such fearful odds in earlier times. The principal statutes which have affected this change are the 3d and 4th Vict. c. 65 and 66, and the 17th and 18th Vict. c. 78. Under these the court exercises jurisdiction over Wages, Possession and Restraint, Mortgages, Bottomry, Necessaries, Salvage and Towage, and Damage.

This increase of jurisdiction, together with the fact that by a recent act of Parliament, practitioners of the courts of common law are now admitted to practice in the Admiralty, presented an opportunity for a new system of rules and regulations of practice; and this opportunity has been availed of by Dr. Lushington and his accomplished Registrar, H. C. Rothery. We have, as the result of their labors, a body of rules which, for fulness of statement and exactness of detail, leave little to be desired. Were time and space allowed, the superiority of these rules, in many respects, to our own, could be pointed out.

The lectures of Mr. Morris on the jurisdiction and practice of the Court of Admiralty have been read by us with a great deal of pleasure. Elementary, as they necessarily are, they contain a more clear and accurate account of the subjects therein treated, than we have been able to find in many a work of greater pretensions. These lectures were delivered gratuitously in December last before the Incor-

porated Law Society, in London, and we commend them to all who are interested in the noble science of maritime law.

And while we congratulate the people of England, and all who are compelled to seek a remedy in her courts, that they have now a tribunal where justice is speedily and impartially administered, according to that enlightened system of jurisprudence which has ever characterized courts governed mainly by the law of nations, we cannot but express a regret that the course of adjudication for the past few years in this country, though it has extended the jurisdiction of the Admiralty in respect to locality, has narrowed it very much as respects the subject matter. Why this should be, we know not. We have no fear of the Admiralty judges of this country usurping power and exercising a jurisdiction which does not belong to them, as by interfering with boys "bathing, or angling, or passing in canoes" on an estuary of the Potomac,* or that the hand of the federal power will be thrust into everything, "even into a vegetable or fruit basket,"† as seems to be apprehended by a learned judge.

The opposition, however, to the jurisdiction of the courts in this country comes, strangely enough, not from the courts of common law, not from the mercantile community, but from the very courts which exercise Admiralty powers.

This being the case, it is with peculiar satisfaction that we find in what we are sorry to say is a dissenting opinion, a most able and unanswerable argument against the adoption of the decisions of the Court of King's Bench in England at the time of Lord Coke, as the basis of our own Admiralty jurisdiction, by the learned Chief Justice of the Supreme Court of the United States. The objections to the enlarged jurisdiction, as now established in this country, are so ably refuted, that we cannot better conclude this article than by making a brief citation from this opinion.

"I can therefore see no ground for jealousy or enmity to the Admiralty jurisdiction. It has in it no one quality inconsistent with, or unfavorable to, free institutions. The simplicity and celerity of its proceedings make a jurisdiction of that kind a necessity in every just and enlightened commercial nation. The delays unavoidably incident to a court of common law, from its rules and modes of proceeding, are equivalent to a denial of justice where the rights

* 16 How. 479. † 20 How. 320.

of seamen, or maritime contracts or torts, are concerned, and seafaring men the witnesses to prove them; and the public confidence is conclusively proved by the well-known fact that, in the great majority of cases, where there is a choice of jurisdiction, the party seeks his remedy in the court of admiralty in preference to a court of common law of the State, however eminent and distinguished the State tribunals may be."*

United States District Court. Massachusetts District, February, 1860.

THE SHIP ZONE.

The French *Code de Commerce* does not differ from the general maritime law, in respect to liens on the ship for damage to the cargo.

On trial of a libel against a ship, to recover damage to cargo proved to have been shipped sound, and delivered damaged, the burden of accounting for such damage is on the claimants.

This was a libel *in rem* to recover damage to a quantity of almonds shipped under a French bill of lading, of which the following is a translation.

MARSEILLES, February 6, 1858.

Shipped in the name of God and of good luck, at the port and harbor of this city, by Rabaud Bros. & Co., for account of whom it concerns, in the American ship called the Zone, commanded by Captain Wells, to be conveyed and transported (God assisting) to New Orleans, and delivered to order, or to whomsoever the below-mentioned merchandise shall be for; marked as follows, viz: "G. H." Four hundred and six bags almonds in the shell, weighing in the whole twenty thousand three hundred kilogrammes, K. 20,300,—making thirty one tons $\frac{230}{1000}$. And on receipt thereof, well-conditioned and free from wet or damage, freight shall be paid, six dollars, with ten per cent. primage per ton.

Weight, contents unknown to
(Signed) JOHN C. WELLS.

The testimony of sixty-eight witnesses was put into the case, the trial of which lasted six days.

* *Taylor* v. *Carryl*, 20 How. 583, 616, per Taney, C. J.

SPRAGUE, J.—The libellants claim as owners and shippers of the almonds mentioned in the bill of lading, for damage to their property. The claimants have made two objections to the maintenance of this suit in the name of the libellants; *first*, that the property belonged to the consignees, Messrs. Cusack & Co. of New Orleans; and *second*, that the suit was commenced without authority from the libellants; but I am satisfied upon the evidence that the libellants were the owners of the property, and that the suit was rightfully brought, and is rightfully prosecuted by them.

The first question to be decided is whether the rights of the parties are to be settled by the French *Code de Commerce*, or by the general maritime law. It is argued, on behalf of the claimants, that as the contract of shipment was made in Marseilles, the law of France controls it, and establishes their duties and liabilities. And they allege that by the French Code, sec. 191, no lien on the ship is given, for damage to cargo, unless caused by the fault of the master or crew. I do not find it necessary to decide this question, for the reason that I do not think I am authorized to infer from the French Code, that it differs, in respect of liens for damage to cargo, from the general maritime law. I think, in the first place, that it is fairly to be presumed that a commercial code of so commercial a nation as France, would not differ from the general maritime maxim, "that the ship is bound to the goods, and the goods to the ship." The Code is the only evidence of the law offered. No testimony of French jurists is in the case, and I am left to form my own judgment of the law from the Code itself. The section (191) insisted upon by the claimants does not profess to create liens, but only to marshal certain liens elsewhere declared to exist. We must look elsewhere for the creation of liens on ships for damage to cargo.

Under the chapter of the Code treating of charter-parties, contracts of affreightment, and freightings, ("*Des chartres-parties, affretemens ou nolissemens,*") this subject is treated. The 280th section is as follows: "The ship, her tackle and apparel, the freight and the cargo, are respectively bound to the performance of the agreements of parties."

The claimants insist that this section is limited to charter-parties, or to contracts for the hiring of a specific portion of the ship. It would be very extraordinary if it were

so limited, and would interfere very materially with the powers of the captain to load his ship in such a manner as to render her seaworthy. Some goods require to be put at the bottom, and others at the top of the cargo. Too much dead weight on the bottom will make the ship labor. Too little will make her crank. Now, if the hirer of a portion of a ship should have the right to insist upon having that portion established by metes and bounds, either perpendicularly or horizontally, it would follow that he would have the right to stow his cargo as he chose, and in such proportions as he preferred. And in case there were several such partial hirers, the control of the stowage would be altogether taken away from the master.

But it is said that there is a special chapter of the code, treating of bills of lading, in which no mention is made of any lien. A bill of lading is not inconsistent with there being also a charter-party, or a contract of affreightment. A bill of lading is evidence of a contract, but it does not necessarily constitute the whole contract. If the sec. 191 is the only one giving a lien for damage to cargo, then it would follow that there is no lien on the ship for damage arising from the fault of the *owner*. The ship might be unseaworthy, and the owner know it, and yet no lien for the damage caused thereby. This is not to be supposed, and I should not adopt the construction of the claimant's counsel, without further proof that such is the meaning of the French code. Believing that the French law does give a lien on the ship in accordance with the general maritime law, it does not become necessary for me to decide by which of the two this contract is governed.

Is the ship liable?

In the first place, were the goods damaged when delivered in New Orleans?

In regard to twelve bags, damaged by rats and rotten from humidity, there is no controversy. As to the residue, the depositions of the consignees, of the person to whom they had been sold to arrive, and who rejected them as damaged, of the port-wardens and marine inspector who examined them, and of others who saw them,—all show that they were damaged. Notice was given to the captain and to the consignees of the ship in New Orleans, and in the newspapers, that the almonds would be sold at auction, and they were so sold for half the value of sound ones. The

captain was notified of the damage, and there was an examination of the almonds in his presence. He was requested to extend a protest, to enable the consignees to recover of the underwriters; but he declined to do so, on the ground that he had had no bad weather on his voyage. On the evidence, I cannot doubt that the almonds were damaged very much beyond the extent admitted by the claimants. The almonds having been shown to be damaged when delivered, and the master having signed a bill of lading implying that they were in apparent good condition when shipped, the burden of proof is on the claimants to show why they did not arrive in good condition. In this bill of lading, it is true that there is no express admission of their reception in good condition; but it is therein provided, that "on their delivery in New Orleans without wet or damage freight shall be paid," and this imports that they were without "wet or damage" when shipped. It is conceded by the libellants, that although the bill of lading does not in terms except the dangers of the seas, this exception is implied.

It is contended that the almonds must have been wet or damaged before going on board in Marseilles.

To meet this, the libellants have produced the testimony of the persons in Spain who purchased the almonds, dried them in a granary, put them into bags, put them on board the steamer for Marseilles, and of the captain of the steamer himself. They have also produced the testimony of the shippers in Marseilles; of their clerks, draymen, and lighterman, by whom the almonds were examined and put on board the ship; and by this complete chain of testimony, exhausting the sources of evidence, it is shown that they were handled only in fair weather, and were in a sound and dry state when put aboard. Furthermore, the mate testifies that the weather was fine the day they came aboard; that he received and saw them, and reported them in good order to the captain for him to sign the bill of lading. He superintended the stowage, and it was his duty to see and report whether they were wet or not.

In reply to this direct evidence, the claimants say that the almonds must have been damaged before coming on board, because the injury could not have arisen on board the vessel. They show that the vessel was properly dunnaged according to usage in Boston; that the ballast was some two feet deep, and that there was sufficient dunnage to

protect the cargo from water from the bottom, and that there was but little water in the hold. But there is evidence that these bags, or the greater part of them, were wet when taken out; that there was *wet* then in the vessel, and that some of them lying against the side of the vessel were rotten from humidity.

Have the claimants shown how this damage was caused? Was it by "blowing?" This may happen where there is but little water in the hold, but from the evidence it would seem that the bags were too generally damaged to have been wet from this cause, which would be more likely to wet only the outer tiers of bags. Was it from a leak in the deck? The mate says the upper deck was tight; but in fact the lower deck was not tight. It cannot be that the goods came on board dry, were delivered wet, and were not damaged while in the ship. Some one of these three propositions must be untrue.

Now, the evidence shows satisfactorily that the goods were wet and damaged when delivered at New Orleans, and the bill of lading admits that the sacks appeared externally to be in good order when taken on board in Marseilles. The burden of proof is then on the claimants to show what caused the damage. Theories may be formed as to the cause of damage, and one theory which is no more improbable than another is, that water may have got in between decks during the voyage.

It must be borne in mind, that one of the reasons for casting the burden of proof of the cause of damage (after the damage itself has been shown) upon the ship-owner is, that as to what takes place during the voyage no one except his agents can testify.

This burden of proof does not allow of a conclusive inference that the damage must have arisen before shipment, because the ship was tight and well dunnaged, and that the ship-owner will be relieved of his liability by such inference. The burden of proof requires that the owner should go farther, and satisfy the court that the damage arose from one of the causes excepted,—anything short of this will not relieve him of his responsibility.

I cannot say that the claimants have done this, because my mind is left in a state of uncertainty as to the cause of the damage, and I therefore must order a decree to be entered for the libellants.

In regard to the amount of the decree, the auction sale must have great weight in determining the value of the almonds in New Orleans, as it appears to have been a fair public sale, of which the captain and the consignees of the ship were notified, and which was abundantly advertised. There were several dealers and bidders present, and there is no evidence of any unfairness. If the parties do not agree as to the amount of damages, the case may be sent to an assessor.

B. R. Curtis and *C. P. Curtis, Jr.* for libellants.

Jno. C. Dodge, for claimants.

Supreme Judicial Court of Massachusetts.

Suffolk, ss.

April, 1860.

Before SHAW, C. J.

In re FRANK B. SANBORN.

Any authority to make an arrest in Massachusetts, which may be vested in the Sergeant-at-Arms of the Senate of the United States, by virtue of a warrant from the President of the Senate directed to the said Sergeant-at-Arms, and commanding him to arrest the person named, wherever found, is in its nature personal, and cannot be delegated to a third party.

This was a hearing on the return of a writ of *habeas corpus*, directed to the sheriffs of the counties, or their deputies, and commanding them to take the body of Frank B. Sanborn, alleged to be restrained of his liberty by Silas Carleton. The writ was served by John B. Moore, a deputy of the sheriff of Middlesex, whose return stated that he had the body of the said Sanborn then before the court. The said Carleton having been summoned according to the tenor of the writ, appeared and filed the following answer.

Supreme Judicial Court,
Suffolk ss. April 4, 1860.

IN THE MATTER OF F. B. SANBORN.

And now comes Silas Carleton, the deputy of Dunning R. McNair, Sergeant-at-Arms of the Senate of the United States of America, and for answer saith, that by virtue of a certain warrant duly issued by authority of the Senate of the said United States now in session on the sixteenth day of February, A. D. 1860, a copy of which is hereunto annexed and made part of this answer, that he did arrest for the

causes in the said warrant and the said copy thereof more fully set forth, on the third day of April instant, the body of the said F. B. Sanborn, at Concord, in the County of Middlesex, and Commonwealth aforesaid, and that afterwards, to wit, on the day and at the place aforesaid, he the said F. B. Sanborn was taken from his custody by one J. B. Moore, then and there acting as one of the deputies of the sheriff of said County of Middlesex, and that the said F. B. Sanborn was so taken from his custody by the said John B. Moore, by virtue of a proceeding or writ under the hand and seal of the Hon. Ebenezer Rockwood Hoar, Associate Justice of this Honorable Court, on the third day of April instant.

(Signed) SILAS CARLETON,
Deputy of the Sergeant-at-Arms of the United States.

Suffolk ss. April 4, 1860.

Subscribed and sworn to before me,
(Signed) S. M. QUINCY,
Justice of the Peace.

[COPY.]

BY AUTHORITY OF THE SENATE OF THE UNITED STATES.

In the Senate of the United States.

To DUNNING R. MCNAIR, Sergeant-at-Arms of the Senate of the United States:

Whereas, F. B. Sanborn, of Concord, in the State of Massachusetts, was on the sixteenth day of January, A. D. 1860, duly summoned to appear and testify before the Select Committee of the Senate, "to inquire into the facts attending the late invasion and seizure of the armory and arsenal of the United States, at Harper's Ferry, in Virginia, by a band of armed men," and has failed and refused to appear before said committee, pursuant to said summons;

And whereas, the Senate did on the fifteenth day of February, A. D. 1860, by a resolution directing the [Vice] President of the United States to issue his warrant to the Sergeant-at-Arms, commanding him to take into his custody the body of the said F. B. Sanborn, wherever to be found, and to have the same forthwith before the bar of the Senate, to answer for a contempt of the authority of the Senate, in thus failing and refusing to appear before the said committee;

You are therefore hereby commanded to take the body of the said F. B. Sanborn, wherever found, and forthwith have the same before the bar of the Senate, to answer for contempt of the authority of the Senate, in thus failing to appear before the committee;

In testimony whereof I have set my hand and the seal of the seal of the Senate of the United States, this sixteenth day of February, 1860.

JOHN C. BRECKENRIDGE,
Vice-President of the United States and President of the Senate.

Attest: ASBURY DICKINS,
Secretary of the Senate of the United States.

Senate Chamber, February 16, A. D. 1860.

I do appoint and hereby empower Silas Carleton to serve this warrant, and to exercise all the authority in relation thereto with which I am vested by the foregoing. D. R. McNair,
Sergeant-at-Arms of the United States.

A true copy. Attest:
(Signed) Silas Carleton.

Shaw, C. J. — This writ was made returnable before a single justice of this court. But as Justices Metcalf, Bigelow, Merrick, and Hoar have been present throughout this case, they have given their aid in the decision, and concur in the following opinion, which is therefore entitled to corresponding weight and authority.

This arrest was made by Silas Carleton, a citizen and inhabitant of Massachusetts; and in his answer, under oath, he shows a warrant to D. R. McNair, Sergeant-at-Arms of the Senate of the United States, and says that the Sergeant-at-Arms entered an order upon it, delegating the power to Carleton to make the arrest.

There is therefore no conflict in this case between the authority of an executive officer of the United States and an officer of this Commonwealth.

It appears by the answer of the officer, which stands as part of the return to the writ of *habeas corpus*, that Carleton claims to have arrested Sanborn under a warrant purporting to have been issued under the hand and seal of the Vice-President of the United States and President of the Senate. It recites the appointment of a committee of the Senate to inquire into the circumstances of the attack made by a body of men upon the arsenal of the United States at Harper's Ferry, the citation of Sanborn to answer as a witness before such committee; that he refused to attend according to such summons; that he was thereby guilty of a contempt; and directing D. R. McNair, Sergeant-at-Arms of the Senate, to arrest the said Sanborn, wherever he could find him, and bring him before the Senate to answer for such contempt. This warrant seems to have been issued on the 16th of February last. There is an indorsement of the same date, by the Sergeant-at-Arms, authorizing and empowering the said Carleton, the respondent, to make such arrest; and the respondent justifies the arrest made on the 3d April instant under the process. The question is, whether this arrest is justified by this return.

This question is a very broad and a very important one, and opens many interesting questions as to the functions and powers of the United States Senate, as a constituent part both of the legislative and executive departments of the United States government, and the modes in which they are to be exercised, and the limits by which they are qualified.

It is admitted in the arguments, that there is no express provision in the Constitution of the United States, giving this authority in terms; but it is maintained that it is necessarily incidental to various authorities vested in the Senate of the United States, in its legislative, executive, and judicial functions, and must therefore be held to be conferred by necessary implication.

These questions, manifestly requiring great deliberation and research in order to come to a satisfactory conclusion, and some preliminary questions having been suggested by the petitioner's counsel, it was proposed, and not objected to by the learned District Attorney and Assistant District Attorney of the United States, by whom the court were attended in behalf of the respondent, to consider these preliminary questions first; because, if the objections, on the face of them, were sustained, it would supersede the necessity of discussing the other questions arising in the case. These points have been argued.

For obvious reasons, we lay out of this inquiry the case of the Senate, when acting in their judicial capacity, on the trial of an impeachment laid before them by the House of Representatives; and we suppose the same considerations would apply to the case of the House of Representatives in summoning witnesses to testify before them, as the grand inquest of the United States, with a view to an impeachment.

Then the objections taken to this warrant, on the face of it, as rendering it insufficient to justify the arrest of the petitioner, are three.

1. That the Sergeant-at-Arms, in his capacity as an officer of the Senate, had no authority to execute process out of the limits of the District of Columbia, over which the United States have, by the Constitution, exclusive general jurisdiction.

2. That a Sergeant-at-Arms is not an officer known to the Constitution or laws of the United States, as a general

executive officer of known powers, like a sheriff or marshal; that he is appointed and recognized by the rules of the Senate as an officer exercising powers regulated by the rules and orders of the Senate, and can only exercise such powers as are conferred on him by such general rules and orders, made with a view to the regular proceedings of the Senate; or such as may be conferred by the Senate by special resolves and acts, as a single department of the government, without the concurrence of the other members of the government.

3. That by the warrant set forth, the power to arrest the respondent was in terms limited to McNair, the Sergeant-at-Arms, and could not be executed by a deputy.

In regard to the first, it seems to us that the objection assumes a broader ground than it is necessary to occupy in deciding this preliminary question. We are not prepared to say that in no case can the Senate direct process to be served beyond the limits of the district, by an authority expressly given for that purpose. The case of *Anderson v. Dunn*, 6 Wheaton, 204, cited in the argument, has little application to this question. It is manifest that that was a writ of error from the Circuit Court for the District of Columbia, and it appears that the alleged contempt of Anderson in offering a bribe to a member of the House of Representatives was committed in the District of Columbia, the act complained of as the trespass was done therein, and the process in question was served therein. In that case the process was served by the Sergeant-at-Arms in person, under an express authority given by the House of Representatives by their resolve for that purpose, in pursuance of which the Speaker's warrant was issued.

The second question appears to us far more material. The Sergeant-at-Arms of the Senate is an officer of that House, like their door-keeper, appointed by them, and required by their rules and orders to exercise certain powers, mainly with a view to order and due course of proceedings. He is not a general officer, known to the law, as a sheriff, having power to appoint general deputies, or to act by special deputation, in particular cases; nor like a marshal, who holds analogous powers, and possesses similar functions, under the laws of the United States, with those of sheriffs and deputies under the State laws.

But even when it appears, by the terms or the reasonable construction of a statute, conferring an authority on a

sheriff, that it was intended he should execute it personally, he cannot exercise it by general deputy, and of course he cannot do it by special deputation. *Wood v. Ross,* 11 Mass. 271.

But, upon the third point, the court are all of opinion that the warrant affords no justification. Suppose that the Senate had authority, by the resolves passed by them, to cause the petitioner to be arrested and brought before them, it appears by the warrant issued for that purpose that the power was given alone to McNair, Sergeant-at-Arms, and there is nothing to indicate any intention on their part to have such arrest made by any other person. There is no authority, in fact, given by this warrant, to delegate the authority to any other person.

It is a general rule of the common law, not founded on any judicial decision or statute provision, but so universally received as to have grown into a maxim, that a delegated authority to one does not authorize him to delegate it to another. "*Delegata potestas non potest delegari.*" Broom's Maxims, 2d edition, 665. This grows out of the nature of the subject. A special authority is in the nature of a trust. It implies confidence in the ability, skill, or discretion of the party intrusted. The author of such a power may extend it if he will, as is done in ordinary powers of attorney, giving power to one, or his substitute or substitutes, to do the acts authorized. But when it is not so extended, it is limited to the person named.

The counsel for the respondent asked what authority there is for limiting such warrant to the person named; it rather belongs to those who wish to justify under such delegated power to show judicial authority for the extension.

On the special ground that this respondent had no legal authority to make the arrest, and has now no legal authority to detain the petitioner in his custody, the order of the court is that the said Sanborn be discharged from the custody of the said Carleton.

J. A. Andrew, S. E. Sewall, and *J. S. Keyes,* for the prisoner.

C. L. Woodbury, District Attorney, and *Milton Andros,* Assistant District Attorney, for respondent.

THE LIABILITY OF STOCKHOLDERS AND OFFICERS OF MANUFACTURING CORPORATIONS.

We propose to examine the statutes and decisions of Massachusetts, relating to the liability of stockholders and officers in manufacturing corporations, for the debts of the company.

At common law there is no liability of individual members of any corporation for the debts of the corporation.

Chief Justice Parsons, at the March Term, 1808, held it to be a trespass on the part of the sheriff, to levy an execution on a member of the Union Turnpike Co. for the debts of the corporation; though his precept directed him to do so. *Nichols* v. *Thomas*, 4 Mass. 233.

St. 1808. The statute of 1808, ch. 65, passed on the 3d March, 1809, was intended to alter the common law, so far as manufacturing corporations were concerned. It applied to corporations thereafter to be created, and was pronounced constitutional. *Child* v. *Coffin*, 17 Mass. 65.*

This statute authorized the sheriff, if a corporation did not in fourteen days satisfy an execution, to levy "the same writ" on any member or members. The court, however, held the sheriff a trespasser for arresting a stockholder who had parted with his stock before the levy of the execution on him for the debts of the corporation. *Leland* v. *Marsh*, 16 Mass. 391. In *Marcy* v. *Clark*, 17 Mass. 330, an execution against a corporation was held to be an execution against all who held stock at the time of the levy; and a sale of shares made with the view of avoiding the liability, was a fraudulent attempt to evade the statute, and did not relieve the stockholder.

Some earlier decisions speak favorably of statutes making stockholders in manufacturing corporations liable; Judge Story in *Cheever* v. *Braintree Powder Co.* 2 Story 451, treats them as remedial acts; the more general current has been in favor of treating them strictly, as in derogation of the common law, if not penal. *Kelton* v. *Phillips*, 3 Met. 61. The court have more than once expressed an unwillingness to extend the statute by construction.

Thus, in the argument of the case of the *Franklin Glass Co.* v. *White*, 14 Mass. 286, it was claimed that manufacturing corporations had under these statutes a reciprocal remedy, by suit against delinquent stockholders, for non-payment of assessments; but the court refused to extend the remedy of the act in any direction, or make it reciprocal. And more lately, in *Trustees of Andover Free School* v. *Flint*, 13 Met. 542, the defendant, treasurer of a mechanics' association, was held not to be personally liable for the debts of the corporation, because it was not a manufacturing corporation, although the by-laws of the corporation declared all members liable, and the defendant had at times considered himself to be so.

*The constitutional question is again opened by a writer in the American Jurist, vol. 5, page 52, in the year 1831.

To remedy some of the defects of the act of 1808, as they were developed in practice, the statute of 1817, ch. 183, (passed Feb. 24, 1818,) made the real and personal estate of those who were members of the corporation "at the time when the debt *accrued*," liable for debts, as well as of those who were members at the time of levy of execution. And the levy might be made on the members under an "alias execution," provided the corporation did not on demand, before the return day of the writ, show personal property to satisfy the execution.

Statute 1821. The statute of 1821, ch. 38, made the member liable for debts "*contracted* during the time of his continuing a member." It will be noticed that the acts of 1808, 1817, and 1821, apply to companies incorporated "after their passage," and under each of them the member was liable to personal arrest.

These statutes touch the extreme rigor of personal liability. After this the legislature began to qualify, postpone, or relax this liability. Sts. 1826, ch. 137; 1829, ch. 53; Rev. Sts. ch. 38; Sts. 1838, ch. 98; 1851, ch. 315.

Repealed Acts. Still these repealed acts of 1808, 1817, 1821, 1826, and 1829, may affect the liability of members of corporations now in existence, that have failed to take advantage of favorable acts passed since the date of their incorporation. And the courts have still occasion to discuss these acts and interpret them.*

It may be said, in general, that members of corporations, created prior to 1808, are exempt from personal liability, unless the corporations have assumed it voluntarily.

Application of Acts. Those incorporated between 1808 and 1817 come under the act of 1808, ch. 65, unless they have taken advantage of subsequent acts,— and so on; but to obtain an accurate view of the acts, prior to the Revised Statutes, to be convinced that they have still an intermittent life, in spite of their repeal, the cases must be consulted, and especially *Kelton* v. *Phillips*, 3 Met. 62; *Curtis* v. *Harlow*, 12 Met. 4; *Gray* v. *Coffin*, 9 Cush. 199.

Under the act of 1808 it had been held, in *Leland* v. *Marsh*, 16 Mass. 391, that a sheriff was a trespasser who arrested a stockholder upon an "alias execution," without a new demand. The arrest, says the court, should be made upon "the same execution." The act of 1817 extended the liability to an "alias execution."

It was held, in *Stone* v. *Wiggin*, 5 Met. 317, that the property of a member attached on mesne process, after a demand on the corporation, cannot be seized on execution, unless the officer has first made a new demand on the president, treasurer, or clerk of the corporation, to show property, or to satisfy the execution. Such member, therefore, under the acts of 1808 and 1817, is entitled to have the corporation twice distinctly called on to show property, or pay the debt, before his own property can be taken on execution.

* Between 1780 and 1808, nine charters were granted to manufacturing companies; between 1808 and 1817 upwards of 100. The entire number from 1780 to 1835 is estimated at 500. Since 1835 they have increased at the rate of 30 per annum. Senate Doc. 90, for 1836. House Doc. 60, for 1840.

Statute 1826. The St. of 1826, ch. 137, introduced other provisions favorable to members. It was in force a short time, and has received but little construction by the courts; the word "debt" in that statute, was held, in *Boardman* v. *Osborn*, 23 Pick. 301, not to be equivalent to the words "debts and contracts," in the act of 1829, and in the Revised Statutes, ch. 38, § 16.

Revised Statutes. The act of 1829, ch. 53, passed Feb. 23, 1830, was reënacted in the Revised Statutes, ch. 38. The liability of stockholders in all manufacturing corporations, incorporated since Feb. 23, 1830, is governed now by the Revised Statutes. Companies incorporated before Feb. 23, 1830, however, may avail themselves of the beneficial provisions of the Revised Statutes; those corporations that had availed themselves of the benefits of the St. of 1829, ch. 53, during its brief existence, are thereby also entitled to the benefits of the Revised Statutes. See Rev. Sts. ch. 38, § 27, and *Curtis* v. *Harlow*, 12 Met. 4. It should be borne in mind, however, that all corporations thus adopting these more lenient provisions of the Revised Statutes, submit their charters "to be revoked" by the legislature, for any cause that they shall deem sufficient. Rev. Sts. ch. 38, § 36; and this may account for our finding at the present day, corporations exposed to all the rigors of the acts of 1808, 1817, and 1821.

The provisions of the Revised Statutes are in many respects more favorable to the stockholder than acts of 1808, 1817, 1821, and 1826. They give the stockholder relief from liability, in case a certificate under oath, of the capital stock fixed and paid in, is recorded in the Registry of Deeds, and a notice is published annually of the assessments voted and paid in, and the amount of all existing debts. Rev. Sts. ch. 38, §§ 16, 17, 22.

Statute 1851. There has been further qualified relief to the member, afforded by the St. of 1851, ch. 315. Stockholders, instead of being "virtually defendants," as the court intimates in *Marcy* v. *Clark*, 17 Mass. 331, are by this act to be actually "summoned." Stockholders may also "defend;" and an execution against a corporation is by this act of 1851, to be levied first on the person or property, of those who were officers at the time when the cause of action accrued, or when the judgment was rendered; next, "on the person or property of any stockholder." None of these modifications, however, make the stockholder properly a defendant with the corporation. Thus he can only contest his own liability as member, and not defend the action against the corporation, *Holyoke Bank* v. *Goodman Manufacturing Co.* 9 Cush. 584. Nor can he remove the action to the Supreme Court as a "defendant," 21 Law Rep. 569.

Various decisions have been given, putting a construction on the Revised Statutes and the subsequent laws, which we will endeavor to classify.

Members, and the time of their liability. Under the St. of 1829, reënacted by the Revised Statutes, it was held, in *The Mill-Dam Foundry* v. *Hovey*, 21 Pick. 454, that those were liable as members, who were holders of stock at the time the debt was contracted.

In *Curtis* v. *Harlow*, 12 Met. 6, those not members at the time the debt was contracted, but who were members at the time the liability was sought to be enforced, were held liable under Rev. Sts. ch. 38, § 16.

In the case of *Holyoke Bank* v. *Burnham*, 11 Cush. 185, it is decided that a person holding shares from April 12, to July 16, was liable under the Revised Statutes, on notes given by the corporation between those dates, though payable after July 15th. But on notes given before April 12th, and payable after July 15th, such stockholder was not liable, that is, for debts contracted before he became a member, and payable after ceasing to be one. The stockholder further endeavored to show, by a separate instrument, not attached to the shares, that they were held as collateral; but the court held, that to exonerate the defendant from general liability, the form of the transfer should have corresponded with the provisions of st. 1838, ch. 98, § 3.

The liability of a stockholder under the act of 1826, where the word "debt" is used alone, was held, in *Boardman* v. *Osborn*, 23 Pick. 301, not to extend to rent due from the corporation, on a quarter which commenced after the member had parted with his stock *bona fide*. The liability of stockholders was assumed to have continued after they had parted with their stock, in the following cases: *Mill Dam* v. *Hovey*, 21 Pick. 455; *Wyman* v. *Powder Co.* 8 Cush. 176, 182; *Cheever* v. *Braintree Powder Co.* 2 Story Rep. 451. In all these cases, the competency of stockholders as witnesses was discussed, and they were excluded on the ground of interest.

In *Eames* v. *Wheeler*, 19 Pick. 443, under the St. of 1808, ch. 65, § 4, the party was held a member, who had received his shares by a deed, not acknowledged before a justice of the peace, and not recorded by the clerk of the corporation.

In *Holyoke Bank* v. *Goodman Paper Co.* 9 Cush. 580, it was held, that one might be charged as a member, who was registered on the stock book of the company, though there was no written instrument transferring the shares from the party holding the stock immediately before him, as required by Rev. Sts. ch. 38, § 12, and St. 1846, ch. 45. And the failure to have the certificate numbered and signed by the treasurer, pursuant to R. S. ch. 38, § 10, was held not to affect the liability of the member; these informalities being waived by the company's recognition of the party as a legal stockholder.

In *Marcy* v. *Clark*, 17 Mass. 335, under the statute of 1808, a transfer, otherwise valid, was held fraudulent and void, because made for the purpose of defeating creditors of the corporation.

Executors not Members. The case of executors, administrators, guardians, and trustees holding stock, was not provided for until the act of 1826, ch. 137, relieved them from arrest and personal liability; this exemption is retained in the Revised Statutes, and in the act of 1838, ch. 98.

Assignee of Insolvent not a Member. An attempt was made in *Gray* v. *Coffin*, 9 Cush. 193, to affect assignees in insolvency, who

took shares from their insolvent debtor and attended meetings of the corporation, with personal liability to another stockholder thereof. But the court held them exempt from such liability; and also that the St. of 1838, which makes the estates in the hands of "trustees" liable, did not apply to assignees under the subsequent insolvent act of that year.

Remedy against Members. We next come to the inquiry, How is the remedy against a member to be enforced? It was held under the Revised Statutes, in *Knowlton* v. *Ackley*, 8 Cush. 97, that all remedies against members by a creditor of the corporation, must follow the statute strictly; that a suit at law did not lie. The plaintiff creditor must either levy upon the member his execution after judgment against the corporation alone; or he must bring a bill in equity against the members of the corporation, confirming.

In *Stedman* v. *Eveleth*, 6 Met. 126, the remedy of the creditor under the Revised Statutes, by bill in equity against the members, before the act of 1851, was held a remedy concurrent with the levy of execution; the creditor being at liberty to adopt the one best suited to his case. But the creditor who is also a stockholder, (and individually liable himself for the debts of the corporation,) cannot have these concurrent remedies against his fellow members; he is confined to his bill in equity, *Thayer* v. *Union Tool Co.* 4 Gray, 75.

Summoning Members. Prior to 1851, the member of a corporation could not appear or be summoned in a suit against the corporation. Since 1851, no member is liable for the debts of the corporation, who is not summoned in the suit. In *Holyoke Bank* v. *Goodman Co.* 9 Cush. 578, members of a corporation were served with a summons, their names were not mentioned in the writ; in the declaration against the corporation, no allusion is made to them. *Held*, a sufficient summons under the act of 1851, ch. 315.

The corporation, defendant in that suit, having been defaulted, it was further held, that the members thus summoned in, could not make a general defence, but were confined to the question of membership. In a later case, *Thayer* v. *Union Tool Co.* 4 Gray, 75, members thus summoned in were allowed to prove that the plaintiff, not a member of the corporation, took the note in suit when over due, and without consideration from the payee thereof, who was himself a stockholder and liable with the defendants for the debts of the corporation.

A summons left at the member's last and usual place of abode, was held a sufficient service under the act of 1851, in *Bardwell* v. *Grafton Manufacturing Co.* 21 Law Rep. 162. And further: a member thus summoned in with the corporation, who has been defaulted without appearance, cannot be allowed to show, in a subsequent suit against the sheriff, for arresting his person on the execution, that he was not a member of the corporation, *Richmond* v. *Willis*, 13 Gray, 182.

The court in *Robbins* v. *Bardwell*, 21 Law Rep. 569, have refused to a member summoned in, the right of removing the action to the Supreme Court as a defendant.

In the case of *Richmond* v. *Willis* it was decided, (S. P. *Abbot* v.

Sprague, 15 Law Rep. 520) that the creditor might cause any member, at his option, among those who were summoned, to be arrested on execution, there being no property of such member that could be attached, and no property of any officer that could be attached.

By *Richmond* v. *Willis*, 13 Gray, it appears that the execution under the Revised Statutes, and under the act of 1851, need not order the arrest of the stockholder.

Recording and Publishing. The decisions in regard to recording in the Registry of Deeds, and publishing annually a statement of the amount of all assessments, and the amount of all existing debts, are as follows: —

In *Mill-Dam Foundry* v. *Hovey*, 21 Pick. 455, it was held that the act of 1829, adopted by the Revised Statutes, did not allow the recording to be a substitute for the annual publication. That an unliquidated claim for damages is a "debt" for which the stockholder is made liable; that the statute is not satisfied by a publication of the debts only, without the capital stock; and that the omission to publish a correct annual certificate is not cured by its publication the year following, when a claim for damages intervenes. In *Sargent* v. *Webster*, 13 Met. 506, the court intimate that a publication of a certificate "in a small portion of the whole circulation of a newspaper" is not sufficient to satisfy the statute.

But when this recorded certificate is in form correct, the court will not allow the creditor, as against a stockholder, to go behind it and prove it false, *Stedman* v. *Eveleth*, 6 Met. 120. By act of April 23, 1838, corporations that are insolvent, and have made an assignment for the benefit of creditors, are relieved from making the annual publication required by R. S. ch. 38, § 22.

Officers. Officers of corporations are liable to various penalties under the Revised Statutes, ch. 38. By sec. 19 they are all jointly and severally liable for the debts, if they neglect to record the certificate of the capital stock originally paid in, or of an increase of the capital. By sec. 20, if the capital is reduced, and the certificate is not recorded, the directors are jointly and severally liable for the debts.

The remedy of a creditor for a breach of Rev. Sts. ch. 38, § 25, against directors, for allowing the amount of the debts to exceed the amount of the capital stock paid in, must be pursued by bill in equity under sec. 31. A suit at law cannot be maintained under sec. 29, against such directors, *Merchants Bank* v. *Stephenson*, 20 Law. Reporter, 582.

Officers under act of 1851. The liability of officers has been extended by the act of 1851. An execution against a corporation, not satisfied by the corporation, is to be levied first on the property of the officers. This remedy against officers, it was suggested by the court, in *Holyoke Bank* v. *Goodman*, &c. 9 Cush. 578, might be cumulative, but the question was not discussed.

The levy of an execution on the property of a member of corporation, before it had been levied on the officer's property, was held in *Denny* v. *Richardson*, 4 Gray, 274, to be a trespa s, it appearing

(notwithstanding an apparent supersedeas) that there were officers of the corporation whose property could be found to satisfy the execution. In *Richmond* v. *Willis*, 13 Gray, it is held that the want of such property of an officer must first appear affirmatively.

It remains to be decided whether, under the act of 1851, and the Revised Statutes the property of an officer can be first taken on execution, without suit or bill in equity against him.

Member v. *Corporation.* The right at common law, that a member of a corporation has to sue the corporation itself, is not much altered by the statutes imposing a personal liability on the members of a corporation. Thus it has been held that in suits against a corporation, the execution held by a member is not to be postponed to the execution held by one not a member, by reason of any liability of such member under the act of 1808, for the debts of the corporation, *Prince* v. *Partridge*, 3 Met. 48. And under the Revised Statutes it has been held that a member of a corporation, taking an assignment of all its property, (in March, 1845,) might hold it against the execution of a subsequent judgment creditor, not a member, *Sargent* v. *Webster*, 13 Met. 505.

Member v. *Member.* The member of a corporation is under more restrictions when he pursues his remedy against his fellow members; though he may not have all the disabilities of a copartner.

At common law, and under the acts of 1808 and 1817, a member individually liable, who paid voluntarily the debts of the corporation, had no remedy for contribution against a fellow member, *Andrews* v. *Callender*, 13 Pick. 496.

By the Revised Statutes, (adopting the act of 1829,) the rigor of the common law has been abated; the member individually liable, voluntarily paying such debts, may sue the corporation, or have a bill in equity against the members, Rev. Sts. ch. 38, § 32. By sec. 33, an officer paying such debts may sue the company and take its property, but he may not sue the members, or take their property.

The rights of members against each other have been freely discussed. It was held, in *Gray* v. *Coffin & als.* 9 Cush. 202, that a stockholder, paying debts of a corporation after its insolvency, and holding a mortgage from the corporation as security, may have judgment against the corporation itself in a suit at law. But he cannot support a bill in equity for contribution against the assignee of a fellow member who is insolvent, charging the assignee personally; nor can he have his remedy by bill in equity against his co-members, until he has exhausted the security put in his hand by the corporation.

Executors, Trustees, and their Estates. Some questions discussed under the acts of 1808, 1817, and 1821, concerning the personal liability of executors, trustees, and guardians were put to rest by the act of 1826, exempting them; and this exemption was continued by the act of 1829, and Rev. Sts. 38, § 34. Doubts as to liability of estates in the hands of executors, trustees, and guardians are supposed to be removed by the same section of the Revised Statutes, and by the act of 1838, ch. 98. In *Stedman* v. *Eveleth*, 6 Met. 114, it was held, that

under the act of 1838, funds in the hand of a trustee for a married woman were liable for the debts of the company. The question of the form of remedy, whether by bill, or suit at law against the trustee, was not discussed. That case was a suit against the corporation, and all questions of form were waived.

The remedy against the estate of deceased members. In *Gray* v. *Coffin & als.* 9 Cush. 202, Chief Justice Shaw suggests that the claim of a creditor under the act of 1838 against the estate of the deceased stockholder, is to be enforced by suit against the executor, if the estate of the member were solvent; if insolvent, by proof of the claim, or, in some contingencies, by bill in equity.

The words which settle the liability of estates of deceased stockholders have not been fully discussed. They are found in R. S. ch. 38, § 34, and repeated in the act of 1839, and provide that the estates shall be liable "in like manner, and to the same extent as the deceased testator, or intestate, or the ward, or the person interested would have been if they had respectively been living and competent to act, and held the same stock in their own names."

In *Ripley* v. *Samson*, 10 Pick. 370, it was expressly held, that a deceased member's estate was not liable under the act of 1808, and the executor paying such debts could not have them allowed in his account. *Andrews* v. *Callender*, 13 Pick. 490; *Cutter* v. *Middlesex Co.* 14 Pick. 483; *Child* v. *Coffin*, 17 Mass. 65.

In *Kelton* v. *Phillips*, 3 Met. 61, the liability was further held to be not such a debt as could be proved against an insolvent stockholder under the act of 1838, S. P. *Bangs* v. *Lincoln*, 21 Law Rep. 230.

Recent Acts. There are recent statutes that have received no construction. For example, the act of 1851, ch. 252, making all companies incorporated since March 11, 1831, liable for the wages of operatives incurred six months prior to demand.

Also, the statute of 1855, ch. 290, exempting holders of special stock in manufacturing corporations, and making the holders of general stock jointly and severally liable for the debts, until the special stock is redeemed in full.

General Statutes, 1860. The General Statutes which go into operation May 31, 1860, have collected and arranged the various statutes relating to the personal liability of stockholders, making, however, very little if any change in the laws themselves. E. B.

Boston, March, 1860.

NOTICES OF NEW PUBLICATIONS.*

Analysis of American Law, presented in a chart, with explanatory comments. By Joseph W. Moulton, Counsellor at Law. New York: *John S. Voorhies, 1859.*

This appears to be a carefully prepared analysis of "American" law, somewhat after the nature of Blackstone's. "American law" is defined

* Owing to the unusual length of the Index contained in this number, several notices of books received have been unavoidably omitted. By the kindness of the future editor, they will appear in the next number.

to be "the conventional expression of the people's will, for their self-government, mutual security, and general happiness, and as a system founded, constructed, and applied upon principles, is reducible to three general heads, — 1 Foundation; 2 Superstructure; 3 Subdivisions, — the last comprising, (1) Rights of persons private, and their guaranties; (2) Wrongs to them and their remedies; (3) Rights of persons public, and their guaranties; (4) Wrongs to them, and their remedies."

The author has a fondness for what he thus defines as "American" law, and advances the somewhat questionable and startling theory, that a student on this side the water should "glean his first knowledge from American law works, prior to his taking up the foreign;" after he has mastered the former, he may, "with lively interest and substantial benefit," says Mr. Moulton, "take up Blackstone and Coke."

HITS AT AMERICAN WHIMS: AND HINTS FOR HOME USE. By FREDERIC W. SAWYER, author of PLEA FOR AMUSEMENTS. Boston: Walker, Wise, & Co. 1860.

The above is the title of a very pleasant book, recently written by a well-known lawyer of this city. It contains a number of short and agreeable essays on American manners, customs, and habits, written in a lively and cheerful style, and, in many instances, effectually using up the folly at which they are aimed.

The essay on Modern Vaticans is very well done, and ought to be posted on the walls of every library in the land. If any one wonders, how it is that the largest and best collection of books in the country do the least good, let him read this article. Perhaps there ought, here and there, to be libraries, like the Astor in New York, where the books shall be securely locked into the alcoves, and never allowed to go out of the building, and where such a work as Mr. Buckle's History might be written, and all its citations verified, without stepping outside the walls of the building, (as Dr. Coggswell tells us might be done at the Astor Library;) but certainly, this mode of closing a collection of books intended for public good, can be justified only on account of their great scarcity and cost; and we think ought not to be tolerated, if the library contains books readily replaced. It is one of the charms of our Boston Athenæum, that you may loiter at will in its alcoves, and examine if you please every volume. We wish we could say as much of the Boston *Public* (?) Library, whose *Circulating Department* even, containing fifteen thousand volumes, "all placed for the convenience of easy use, in the lower hall of the Library Building, and all believed to be well fitted for free and general circulation," as the Trustees inform us, is wholly excluded from inspection, by being placed in a room which the public, except, we believe, in rare instances and by special permission, are never allowed to enter; not to say anything of the 50,000 volumes in the upper hall, which are very much more effectually shut out from public use. But we are not discussing the question; let any one who is interested in it read the article.

The book has naturally a legal tone and bearing. We commend "Jury Trials and Trials of the Jury," and "Luckless Wight," to all lawyers accustomed to consider our modes of administering law as the perfection of wisdom.

We wish the author had omitted his article on "Religious Creeds," and several incidental discussions on that subject. But on the whole we cordially welcome the book, and are glad to find in it another indication, that the severe studies and toils of the law, do not of their nature and by necessity, debar the lawyer from lighter relaxations and pleasures.

A Treatise on the American Law of Landlord and Tenant; embracing the statutory provisions, and judicial decisions of the several United States in reference thereto, with a selection of precedents. Third edition. By John N. Taylor, counsellor at law. Boston: Little, Brown, & Co. 1860.

Mr. Taylor's book has been now for several years before the profession and the public, and has won an enviable reputation as a concise and well-arranged summary of the important title of which it treats. For our own part we can say that we have had it in constant use for a long time, and have found it much the most serviceable work upon the subject. The English law of landlord and tenant, although the foundation of ours, has been so much varied by statute usages in this country that English text-books are not adapted to our most usual wants; and this volume supplies the need.

We have not the time to examine into the thoroughness with which all the latest decisions have been collected for the present edition; but we could point to some important Massachusetts cases which are omitted.

The Law of Sales of Personal Property. By Francis Hilliard. Second edition greatly enlarged and improved. Philadelphia: T. & J. W. Johnson & Co. 1860.

The learned author of this useful book says in his preface to the present edition, that it is substantially a new book, greatly enlarged and adapted to the present time, and improved out of the large experience of its author in kindred labors.

We do not happen to be acquainted with the first edition, but we believe the book in its present form to be studiously adapted to our present wants. The subject has been pretty fully treated of late, in the works on contracts; but we see no reason why this separate book should not still hold its ground as a valuable book of reference.

Commentaries on the Law of Bills of Exchange, Foreign and Inland, as Administered in England and America, &c. By Joseph Story, LL. D. Fourth edition, revised, corrected, and enlarged. Boston: Little, Brown, & Co. 1860.

This edition of Judge Story's commentary, like the last, is prefaced by Judge Bennett, whose name is a sufficient guarantee that the "modern improvements" have been added to the former structure.

INTELLIGENCE AND MISCELLANY.

EDITORIAL.

This number of the Law Reporter closes the year, and the connection of the present editors with the work. The Reporter will henceforth be edited by Hon. George P. Sanger. Judge Sanger needs no introduction to the readers of this journal, as he was its able and efficient editor for many years. We have only to wish him that success which we know he will abundantly merit.

To our readers we have only to say that we heartily thank them for the many tokens we have received of kindness and approbation, and bid them an affectionate farewell.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1860.	Returned by
Bachelor, Joel	Northbridge,	February 25,	Henry Chapin.
Baker, K. W.	Winchester,	" 23,	Wm. A. Richardson.
Bartlett, Henry (1)	Boston,	" 11,	George White.
Belcher, Allen A.	Randolph,	" 15,	"
Bickford, James T. (1)	West Roxbury,	" 11,	"
Brown, Edwin R. (2)	Boston,	" 11,	Isaac Ames.
Colburn, Phineas	Roxbury,	" 11,	George White.
Currier, Horace P.	South Reading,	" 13,	Wm. A. Richardson.
Dunbar, Lucius	West Bridgewater,	" 7,	Wm. H. Wood.
Durham, Charles (3)	Chelsea,	" 4,	Isaac Ames.
Fessenden, Abijah	Dorchester,	" 21,	George White.
Fisher, Chandler	Milton,	" 15,	"
Fowle, John A. (4)	West Roxbury,	January 30,	"
Fry, John E.	Bolton,	February 29,	Henry Chapin.
Fuller, Micajah	Blackstone,	" 21,	"
Gibbs, Edward B.	Sandwich,	" 22,	J. M. Day.
Guild, Julia Ann	Dedham,	" 3,	George White.
Hall, John W. (4)	Boston,	January 30,	"
Hoar, John S.	Boxborough,	February 21,	Wm. A. Richardson.
Hunt, Nehemiah	Boston,	" 29,	Isaac Ames.
Jamerson, Clarke	Barre,	" 29,	Henry Chapin.
Joselyn, Ellis K.	Cambridge,	" 11,	Wm. A. Richardson
Lamson, Benjamin	Boston,	" 10,	Isaac Ames.
Leach, Lemuel	Plymouth,	" 6,	Wm. H. Wood,
Linikin, Benjamin	Melrose,	" 11,	Wm. A. Richardson.
Ludwig, Matthew	Boston,	" 1,	Isaac Ames.
Macomber, William	"	" 6,	"
Morgan, L & Co. (5)	Oxford,	" 27,	Henry Chapin.
Packard, Isaac	North Bridgewater,	" 28,	Wm. H. Wood.
Packard, Lucius H.	"	" 8,	" "
Packer, Charles (6)	Newton,	" 21,	Wm. A. Richardson.
Parker, Charles	West Roxbury,	January 28,	George White
Pingree, Henry B.	Lowell,	February 27,	Wm. A. Richardson
Proctor, James K.	"	" 14,	" "
Rich, John (7)	Conway,	" 3,	Charles Mattoon.
Smith, Joseph M.	Boston,	" 13,	Isaac Ames.
Snelling, John	Grafton,	" 23,	Henry Chapin.
Stetson, Isaiah	Hanson,	" 20,	Wm. H. Wood.
Stone) Henry D.	Worcester,	" 9,	Henry Chapin.
Sweetser, Madison	South Reading,	" 8,	Wm. A. Richardson.
Townsend, Henry G. (7)	Conway,	" 3,	Charles Mattoon.
Treat, John T. P.	Boston,		Isaac Ames.
Upton, Samuel F. (3)	Chelsea,	" 4,	"
Ward, Simon B. (2)	Cambridge,	" 11,	"
Willey, Ephraim, Jr.	Newton,	" 21,	Wm. A. Richardson
Wyeth, Joseph	Chelsea,	" 9,	Isaac Ames.

FIRMS AND COMPANIES.

(1) Not stated.
(2) Edwin R. Brown & Co.
(3) Samuel F. Upton & Co.
(4) Not stated.
(5) L. Morgan & Co. Individual names not stated.
(6) Charles Packer & Co.
(7) Conway Chair Company.